

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELMER O'CONNELL,

Petitioner,

vs.

JEFF UTTECH,

Respondent.

NO. CV-08-123-CI

ORDER ADOPTING REPORT AND
RECOMMENDATION AND DISMISSING ALL
CLAIMS WITH PREJUDICE

BEFORE THE COURT is the Report and Recommendation to grant Respondent's Motion to Dismiss All Claims With Prejudice. Petitioner timely¹ filed objections on February 20, 2009, Ct. Rec. 22, which objections the court has reviewed and finds to be without merit. Petitioner's objections raise no meritorious issues or arguments regarding counsel's investigation and witness selection. Petitioner failed to dispute the Magistrate Judge's finding that lesser included instructions in non-capital cases are not required under established federal law. Petitioner's claim of cumulative error is without merit due to his failure to show any deprivation of due process. Although Petitioner desires a new hearing, he appears to concede that the record is adequate for review of his allegations. Finally, with

¹Petitioner requested additional time to filed objections, which this court granted. Ct. Rec. 21

1 regard to Petitioner's claim of ineffective assistance of counsel, the
2 court of appeals properly based its determination on *Strickland v.*
3 *Washington*, 466 U.S. 668, 686 (1984), established federal law, as
4 found by the Magistrate Judge.

5 Having reviewed the February 3, 2009 Report and Recommendation
6 (Ct. Rec. 19) and Petitioner's objections thereto (Ct. Rec. 22), the
7 Report and Recommendation is **ADOPTED in its entirety**.

8 Based on the forgoing, **IT IS HEREBY ORDERED:**

9 1. Respondent's Answer, construed as a Motion to Dismiss under
10 Rule 8, Rules Governing Section 2254 Cases, (**Ct. Rec. 12**) is **GRANTED**
11 and the Petition for Writ of Habeas Corpus (Ct. Rec. 5) is **DISMISSED,**
12 **with prejudice.**

13 **IT IS SO ORDERED.** The District Court Executive is directed to
14 enter this Order, forward a copy to Petitioner and close the file.

15 **DATED** this 3rd day of April, 2009.

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17 ***s/Lonny R. Suko***

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19 LONNY R. SUKO
20 UNITED STATES DISTRICT JUDGE
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